(C)

No. 96-91



IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

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CITY OF CHICAGO, *et al.*,
*Petitioners*,

vs.

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
*Respondents*.

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**On Writ of Certiorari**
**To The United States Court Of Appeals**
**For The Seventh Circuit**

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# BRIEF OF *AMICI CURIAE* NATIONAL TRUST FOR HISTORIC PRESERVATION, NATIONAL ALLIANCE OF PRESERVATION COMMISSIONS, AND LANDMARKS PRESERVATION COUNCIL OF ILLINOIS SUPPORTING PETITIONERS

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## INTEREST OF AMICI CURIAE[1]

*Amici Curiae* have a direct interest in the Court's determination whether state and local administrative boards and agencies, when faced with combined federal and state claims filed against them in state court, will have the option of removing those cases to federal court.

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[1]The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or part and that no person or entity, other than *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of the brief.

The National Trust for Historic Preservation in the United States is a private, non-profit organization chartered by Congress in 1949 to promote public participation in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. *See* 16 U.S.C. §§ 461, 468. With the support of its 275,000 members, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. The National Trust has seven regional and field offices around the country.

The National Trust's expertise in historic preservation law is widely known; the Trust has participated in more than one hundred historic preservation cases during the past twenty-five years. Through its Legal Defense Fund, the National Trust advocates to secure judicial, administrative, and legislative decisions that uphold the validity and effectiveness of regulatory protections for historic properties and land-use regulations in general. The National Trust has participated as *amicus curiae* in ten Supreme Court cases involving challenges to local government land use regulatory authority under the United States Constitution. In addition, the National Trust has participated in a number of federal and state court cases around the country in which local historic preservation board decisions have been challenged on constitutional grounds. The National Trust is also active in historic preservation litigation where state administrative law claims are heard in federal and state courts.

The National Alliance of Preservation Commissions ("Alliance") is a non-profit public interest corporation established by a network of local preservation commissions in 1983. The Alliance's mission is to encourage architectural, cultural, and historic preservation in the United States by providing technical assistance to and advocating for local preservation commissions. The Alliance has 682 members in all 50 States, Puerto Rico, and the Virgin Islands, including 289 preservation commissions. In addition to its membership, the



Alliance regularly communicates with more than 2,000 preservation commissions nationwide.

The Landmarks Preservation Council of Illinois ("LPCI") is an Illinois not-for-profit corporation and voluntary membership organization founded in 1971. LPCI is located in the city of Chicago and has approximately 2,000 members throughout the state of Illinois. LPCI's members pay dues which go toward supporting LPCI's efforts to encourage landmark preservation throughout the state. LPCI's primary purpose is to promote public appreciation and continued use of landmark buildings through various means, including active participation in public hearings on landmark designation issues and other efforts to increase the public awareness of landmark preservation. Because of its efforts to support landmark preservation in the state of Illinois, LPCI has an interest in the outcome of this particular litigation and in its implications for landmarks litigation in general.

*Amici* believe they can assist the Court's consideration of the nature and scope of the removal statute. *Amici* have direct experience in helping local governments to defend cases, brought in state courts against local administrative boards regulating historic preservation and land use, that raise federal claims. *Amici* can therefore provide a national perspective on the importance of preserving access to a federal forum for local administrative board defendants.

## SUMMARY OF ARGUMENT

The Seventh Circuit's decision, in effect, prevents defendants in state administrative law cases that require on-the-record review from ever having the opportunity to have *federal* claims heard in federal court. That decision does not comport with the plain language of the removal statute. Nor is it consistent with

Congress's intent and policy choice in enacting that provision. In reaching this extraordinary result, the court of appeals disregarded the fundamental premise underlying the removal statute: that defendants should have the same opportunity as plaintiffs to choose to have federal claims heard in a federal forum.

1. Strong policies underlie Congress's decision to create removal jurisdiction: The federal forum often is the best place to have federal claims heard because federal courts offer the advantage of federal law expertise, uniformity and consistency in decision making, insulation from local influence, and have greater resources at their disposal. These considerations are especially pertinent in cases involving challenges to historic preservation and land use regulatory actions. Such cases often raise novel, complicated federal constitutional questions that benefit from the expertise, knowledge, and resources of federal courts.

2. The court of appeals was wrong in concluding that actions involving on-the-record review of state administrative agency decisions are not "civil actions" within the plain meaning of the removal statute. The plain meaning of "civil action" clearly encompasses review of state agency action. The Administrative Procedure Act confirms that Congress intended that review of administrative actions belongs within the federal question jurisdiction of federal courts. Thus, a garden-variety federal administrative law case plainly is a "civil action" even though it requires the court to show deference to the agency record. There is no legal basis for the conclusion that removal jurisdiction should turn on whether the federal court's review is of a state, rather than a federal, agency's action. Congress weighed in on this question by enacting the Individuals with Disabilities Education Act, which provides for deferential review of *state* administrative agency action in federal court. This enactment confirms that Congress intended the term "civil



action" to include deferential review of state administrative action.

Congress created no exception to removal jurisdiction for state administrative law claims, as it has done expressly for other types of claims. Nor would there be any basis for judicial creation of such an exception. It is axiomatic that when Congress has chosen not to create an express exception to a particular rule, the courts are not free to create one themselves.

Even if the court of appeals were correct that the state administrative law claims could not be heard in federal court, there would be no justification for its ruling that the entire case, including the federal law claims, could not be heard in federal court. The court relied on *dicta* from an Eleventh Amendment case that had no application to this case and was itself wrongly decided. Nothing in this Court's jurisprudence compelled the Seventh Circuit's conclusion that federal jurisdiction over federal claims is destroyed when the federal claims are combined with state law claims that cannot themselves be heard in federal court. To the contrary, federal courts have a fundamental obligation to exercise federal jurisdiction over federal claims.

The Seventh Circuit's decision should be reversed.

## ARGUMENT

### I. HISTORIC PRESERVATION BOARDS AND OTHER LOCAL ADMINISTRATIVE AGENCIES HAVE A SUBSTANTIAL INTEREST IN ACCESS TO A FEDERAL FORUM TO DEFEND FEDERAL CONSTITUTIONAL CLAIMS.

It is important at the outset to be clear about what is at stake in this case. The Seventh Circuit held that the City had no right to remove to federal court a state-court lawsuit, which included

claims that two municipal ordinances, on their face and as applied to respondents, violated the takings, equal protection, and due process clauses of the Fourteenth Amendment. The court reasoned that respondents had immunized these federal constitutional claims from adjudication in federal court by including in their complaint a request for administrative review under state law of the actions of Chicago's Landmarks Commission. In so doing, the court ruled in effect that one category of defendants -- state and local agencies involved in cases that include "deferential" state administrative review claims -- should be denied the right to choose to litigate related *federal* claims in *federal* court.

### A. Removal Jurisdiction Reflects Congress's Recognition of the Important Policy Reasons Why A Federal Forum Should be Available to Defendants.

Fundamental to the laws governing federal jurisdiction is the principle that either party in a case may choose to litigate a federal claim in a federal forum. A plaintiff, of course, can choose to file a case in federal court, as long as at least some of the claims are based on federal law. A *defendant*, in turn, can remove a federal case to federal court even where the plaintiff has chosen to file in state court. 28 U.S.C. § 1441.[2]

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[2] *See* Erwin Chermerinsky, *Federal Jurisdiction* § 5.5, at 286 (1989) ("The existence of removal jurisdiction reflects the belief that both the plaintiff and the defendant should have the opportunity to benefit from the availability of a federal forum."). A non-diverse plaintiff, of course, can choose to preclude federal jurisdiction by raising no claims that arise under federal law. *See Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908); *Gully v. First Nat'l Bank*, 299 U.S. 109, 112-13 (1936); *see also Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 282 (1918) ("[T]he plaintiff may by the allegations of his complaint determine the status with respect to removability."); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) ("The [well-pleaded complaint] rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.") (footnote omitted).



Congress gave defendants the right to remove cases to federal court when such cases include federal claims because, in hearing federal claims, federal courts can provide particular advantages of judicial expertise, economy, uniformity, and expediency in decision making. For these reasons, a defendant facing federal claims will often have a real interest in being able to bring the case into a federal tribunal. *See* Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977).

*First*, federal courts have greater expertise in handling questions of federal law. Their familiarity with federal legal issues increases the likelihood that they will render a correct decision. *See* Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 159 (1953); *see also* Neuborne, *supra*, at 1121-24.

*Second*, and related to the issue of expertise, is the ability of federal courts to ensure uniformity and consistency in their decision making. Congress designed the federal court system to create greater uniformity in interpretation of federal law than would be provided by a multiplicity of state court systems. *See* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 Am. U. L. Rev. 369, 373 & n.9 (1992) (one rationale for federal question jurisdiction "is the need for uniform interpretation and application of federal law") (citing J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* § 2.3, at 15 (1985)); *cf. Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (consistency and uniformity is a compelling justification for supremacy of federal law).

Because state courts hear fewer actions raising claims of federal statutory or constitutional law, they are more likely to adopt an approach that is out of step with holdings on comparable issues decided elsewhere. Moreover, when state courts do address federal questions, the only mechanism ensuring uniformity and consistency is this Court's certiorari

jurisdiction. Given the number of state court cases applying federal law and the independent and adequate state ground doctrine, which can insulate state court interpretations of federal law from further review,[3] this Court's appellate review of state decisions cannot ensure uniformity among the fifty state supreme courts in the same way that federal circuit courts can ensure that federal law is correctly and consistently applied in the district courts.

*Third*, the option of removing an action to federal court protects the litigants' rights to have cases heard free from local influence. This Court has specifically recognized that the creation of federal question jurisdiction was motivated by a desire to protect federal rights from the vagaries of some state courts. *See Haring v. Prosise*, 462 U.S. 306, 323 (1983); *Patsy v. Board of Regents*, 457 U.S. 496, 505 (1982). Such concerns also informed Congress's creation of the removal statute. *See, e.g., Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 341 (1976) (noting the accepted belief that Congress enacted the removal statute to "prevent prejudice in local courts"); *see generally* Neal Miller, *supra*, at 409-10.

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[3] *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). Because state supreme courts can rest their decisions on adequate and independent state law grounds, state courts are free to construe federal law while still shielding their decisions from appellate review. This anomalous situation is illustrated by the case of *First Covenant Church v. City of Seattle*, 787 P.2d 1352 (Wash. 1990), *vacated and remanded*, 499 U.S. 901 (1991). In *First Covenant*, the Washington Supreme Court decision held that a landmarks preservation statute violated the Free Exercise Clause as applied to a church. This ruling was vacated and remanded by this Court in light of an intervening decision. On remand, the court went to great lengths to distinguish the federal law precedent, but it ultimately rested its decision to reinstate its prior decision on an adequate and independent state constitutional ground, even though it clearly conflicted with binding federal precedent. *First Covenant Church v. City of Seattle* (*First Covenant II*), 840 P.2d 174, 228 (Wash. 1992) (en banc). In such cases, where a complaint on its face pleads violations of federal law, allowing a plaintiff's case to retreat to state law nullifies federal review and frustrates efforts to bring uniformity to interpretations of federal law.



The federal courts, being more insulated from such local interests by lifetime tenure and presidential appointment, can better ensure decisions untainted by potential prejudice against rights protected by federal law. *See* Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Probs. 216, 234 (1948) ("[T]he reason for providing the initial federal forum is the fear that state courts will view the federal right ungenerously."); *cf.* Neal Miller, *supra*, 41 Am. U. L. Rev. at 435 (empirical findings that fear of local bias is a significant factor when attorneys choose to remove federal questions to federal court). In contrast, state court judges are often elected, meaning that they tend to be more responsive to dominant local interests.

*Fourth*, the federal courts may be more expeditious in decision making. Most state courts have lagged behind federal courts in developing and applying comprehensive programs for increasing the speed and efficient administration of their civil dockets. *See* Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 Stan. L. Rev. 1553, 1553 (1994) (citing differences in the resources federal courts have at their disposal in comparison with state court systems).

### B. Removal Jurisdiction Is Especially Important in Historic Preservation and Land Use Regulation Cases.

These policy considerations are particularly important in cases where the defendant is a historic preservation board, since the law in this area is specialized and the potential for inconsistent judicial decisions and undue influence may be stronger than in other types of cases. Thus, defendants in this category of cases have a special interest in preserving access to federal courts to adjudicate federal claims.

Because historic preservation has emerged as an area of local land use regulation primarily in the last three decades, there is less than the usual amount of authoritative guidance for state courts on how to decide constitutional issues of major consequence. Not until after 1978, when this Court upheld the constitutionality of New York City's historic preservation law against a regulatory takings claim in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), did historic preservation laws become as widespread as they are today.[4] As a result, reviewing courts often find there is little binding precedent in the context of historic preservation claims applying the takings clause,[5] vagueness doctrine,[6] the equal protection clause,[7] procedural and substantive due process,[8] the

[4] At that time, all 50 states and more than 500 municipalities had enacted historic preservation laws. *Penn Central*, 438 U.S. at 107 n.1 (citing National Trust for Historic Preservation, *A Guide to State Historic Preservation Programs* (1976)). In the wake of *Penn Central*, the number of local historic preservation ordinances doubled by 1986 to more than 1,000, *see* Tersh Boasberg, Thomas A. Coughlin & Julia Hatch Miller, 1 *Historic Preservation Law & Taxation* § 7.01 (1986), and tripled by 1989 to 1,500. *See* American Planning Ass'n, *Responding to the Takings Challenge*, Planning Advisory Service Report No. 416, at 23 (R. Roddewig & C. Duerkson eds. 1989). Today that number has quadrupled to approximately 2,000. Survey by National Alliance of Preservation Comm'ns, U.S. Preservation Comm'n Identification Project Data Base, maintained by the Office of Preservation Servs., School of Envtl. Design, Univ. of Georgia (May 1996).

[5] *See, e.g., Penn Central*; *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976); *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

[6] *See, e.g., Maher*, 516 F.2d at 1062; *Mayes v. City of Dallas*, 747 F.2d 323, 325 (5th Cir. 1984); *Nadelson v. Township of Millburn*, 688 A.2d 672 (N.J. Super. Ct. Law Div. 1996); *U-Haul Co. of Eastern Missouri, Inc. v. City of St. Louis*, 855 S.W.2d 424 (Mo. Ct. App. 1993).

[7] *See, e.g., Estate of Tippett v. City of Miami*, 645 So. 2d 53, 537 (Fla. App. 1994) (Gersten, J., concurring); *Second Baptist Church v. Little Rock*



free exercise,[9] establishment[10] and/or free speech[11] clauses of the First Amendment, and federal statutes such as the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4.[12]

Because federal courts are more familiar with federal constitutional law, they may be better equipped to resolve such difficult federal claims when they arise in preservation disputes. Moreover, this familiarity makes it more likely that uniform and consistent decisions will be made, thereby helping to develop a coherent body of law in historic preservation that can be relied upon by other courts in individual cases.

Finally, concerns about local influence are particularly relevant to historic preservation and local land use regulation. The decisions of local historic preservation boards and other land use regulatory agencies by their nature can have a significant impact on particular parcels of real property. Thus, powerful local real estate and development interests, and political groups such as property rights organizations, may be aligned against the historic preservation board. In this case, for

*Historic Dist. Comm'n*, 732 S.W.2d 483, 486-87 (Ark. 1987).

[8] *See e.g., Maher*, 516 F.2d at 1059-62; *Metropolitan Dade County v. P.J. Birds, Inc.*, 654 So. 2d 170 (Fla. App. 1995).

[9] *See, e.g., St. Bartholomew's*, 914 F.2d at 354; *First Covenant II*, 840 P.2d 174 (Wash. 1992).

[10] *See, e.g., Alger v. City of Chicago*, 748 F. Supp. 617 (N.D. Ill. 1990).

[11] *See, e.g., Globe Newspaper Co. v. Beacon Hill Architectural Comm'n*, 100 F.3d 175 (1st Cir. 1996); *Sciarrino v. City of Key West*, 83 F.3d 364 (11th Cir.), *cert. denied*, 117 S. Ct. 768 (1996); *Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 2395 (1993); *Burke v. City of Charleston*, 893 F. Supp. 589 (D.S.C. 1995) .

[12] *See, e.g., City of Boerne v. Flores*, 73 F.3d 1352 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 293 (1996) (argued Feb. 19, 1997).

example, a real estate developer entered into a partnership with the International College of Surgeons tc develop historic lakefront property into luxury condominiums. At stake are tens of millions of dollars. Pet. App. 28a-29a. In such a case, there is a potential for a local elected judge to feel pressure to find a way to allow the project to go forward. While it is not the case that state courts will necessarily succumb to such influences, it remains true that the federal court system was designed to protect against just this kind of risk. *See* Neuborne, *supra*, at 1127-28.

This does not mean, of course, that historic preservation boards and other similar defendants would *always* choose to remove cases including federal claims. In many cases, they may decide that there is no reason to bypass state court adjudication of the case, particularly in view of the state courts' familiarity with local law. Certainly, in cases where only state law is at issue, the state court is the correct and only forum. *See, e.g., United Artists Theater Circuit v. City of Philadelphia*, 635 A.2d 612 (Pa. 1993) (state constitution construed in accordance with federal constitution presented only state law claims). And examples abound of state court decisions where issues of state and federal law were effectively and correctly resolved in state court. *See, e.g., Teachers Ins. & Annuity Ass'n v. City of New York*, 623 N.E.2d 526 (N.Y. 1993); *383 Madison Assocs. v. City of New York*, 598 N.Y.S.2d 180 (App. Div. 1993), *cert. denied*, 511 U.S. 1081 (1994); *Estate of Tippett v. City of Miami*, 645 So. 2d 533 (Fla. App. 1994).

Petitioners, like other defendants, should have the choice of the federal forum. As we show in the next section, there is no evidence that Congress decided otherwise.



## II. A LAWSUIT THAT INCLUDES BOTH FEDERAL CLAIMS AND STATE LAW CLAIMS SEEKING ON-THE-RECORD REVIEW OF STATE ADMINISTRATIVE ACTION IS A "CIVIL ACTION" OVER WHICH THE FEDERAL DISTRICT COURTS HAVE ORIGINAL JURISDICTION FOR PURPOSES OF REMOVAL.

Under 28 U.S.C. § 1441(a), a defendant may remove to federal court "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." The Seventh Circuit held that this provision did not apply to this case, because the complaint filed in state court included requests for administrative review under state law based solely on the administrative record, and thus did not constitute a "civil action." That conclusion was plainly wrong.

It is useful to begin by noting what the Seventh Circuit did not hold. The court of appeals did not dispute that a "civil action . . . of which the district courts . . . have original jurisdiction" can include an action in which federal claims are paired with related state-law claims. Nor could it. The federal claims in such a case are covered by the grant of "federal question" jurisdiction in 28 U.S.C. § 1331, while the state claims are also cognizable in federal court under the grant of "supplemental" jurisdiction in 28 U.S.C. § 1367.

The Seventh Circuit also acknowledged that the term "civil action . . . of which the district courts . . . have original jurisdiction" can include a state-court suit challenging the actions of a state or local administrative agency, as long as there is some basis for federal jurisdiction, such as diversity of citizenship or a federal question. Pet. App. 11a (citing *Chicago, Rock Island & Pacific Railroad v. Stude*, 346 U.S. 574 (1954), and *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1967)). This, too, is an entirely uncontroversial proposition. Indeed, it is one of the principal functions of

federal courts to bring state and local agencies into conformity with federal, and sometimes state, law.

The sole basis for the Seventh Circuit's ruling was the specific nature of the state-law claims pled in the original state-court actions -- the fact that they constituted requests for review of administrative actions *based on the administrative record*. Focusing on the fact that the trial court could not receive new evidence and make its own findings of fact, the court characterized this kind of action as one involving "appellate" review. This conclusion is wrong for several reasons.

### A. The Entire Case Is a "Civil Action" That Can Appropriately Be Heard in Federal Court.

First, Congress had no intention of barring any part of this type of case -- including the state administrative review claims filed under state law and requiring deference to the agency action -- from being heard in federal court. It used a statutory term, "civil action," that is very broad and inclusive. "Civil action," in turn, was derived from the terms "suit of a civil nature" and "civil suit," which appeared in the predecessor removal statute.[13] "Suits of a civil nature, at law or in equity" referred to any kind of suit that was not criminal. *See Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 270-71 (1935) (phrase "suits of a civil nature" in original jurisdiction statute, 28 U.S.C. § 41(1) (1940), "is used in contradistinction to 'crimes and offenses'"). There is thus every reason, based on the statutory language alone, to conclude that Congress intended the scope of the removal statute to be broadly interpreted.

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[13] *See* 28 U.S.C. §1441 note ("Phrases [in § 1441] such as 'in suits of a civil nature, at law or in equity,' and the words, 'case,' 'cause,' 'suit,' and the like have been omitted and the words 'civil action' substituted in harmony with . . . the Federal Rules of Civil Procedure.").



More specifically, use of the same term elsewhere in the United States Code undermines any suggestion that Congress did not consider suits seeking on-the-record administrative review to be "civil actions." In *Califano v. Sanders*, 430 U.S. 99 (1977), for example, this Court analyzed the jurisdictional basis of administrative review claims filed in federal court against *federal* agencies. The Court held that the Administrative Procedure Act is not a separate grant of federal jurisdiction and that jurisdiction over such claims instead is based on the general federal-question provision, 28 U.S.C. § 1331, which applies only to "civil actions arising under the Constitution, laws, or treaties of the United States." *See* 430 U.S. at 106 (stating that the "expansion of § 1331," coupled with a separate provision limiting review of agency action, "apparently expresses Congress' view of the desired contours of federal-question jurisdiction over agency action"). *Califano v. Sanders* thus stands for the proposition that lawsuits seeking review of administrative agency actions are "civil actions."

This is particularly significant because federal district court suits challenging federal agency actions typically are governed by a deferential standard of review requiring the court to look only at the administrative record[14] -- precisely the characteristic that led the Seventh Circuit to exclude this case from the category of "civil actions."

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[14] *See Camp v. Pitts*, 411 U.S. 138, 141-42 (1973) (per curiam); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). A number of other federal statutes, like section 205(g) of the Social Security Act at issue in *Califano v. Sanders*, premise district court review of federal agency actions on deference to the agency record. *See* 49 U.S.C. § 11705(d) (Interstate Commerce Commission reparation orders); 7 U.S.C. §§ 210(f), 499g(b) (Secretary of Agriculture decisions under the Packers and Stockyards Act and the Perishable Commodities Act). This "group of federal statutes provides for enforcement in an original--as distinguished from an appellate--action in a United States district court." Walter Gellhorn, Clark Byse, *et al.*, *Administrative Law* 986 (8th ed. 1987).

In reaching that conclusion, the Seventh Circuit relied primarily on language in this Court's decisions in *Stude* and *Horton*. In both of those cases, however, the Court *upheld* federal jurisdiction to hear claims seeking administrative review of state agency actions. *See Stude*, 346 U.S. at 578-79 (a perfected appeal of a state administrative decision is "in its nature a civil action and subject to removal by the defendant to the United States District Court" (citing *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 407 (1878)). Moreover, since state law in both cases called for *de novo* review, the Court had no occasion to determine whether a more deferential standard of review would have changed the outcome. The statements cited by the Seventh Circuit are thus pure *dicta*, and furthermore do not explain *why* a deferential standard of review could prevent the treatment of state administrative review actions as "civil actions," when precisely the opposite rule applies to comparable actions seeking review of federal agency decisions.

Certainly it is hard to see how the identity of the agency defendant -- local, state or federal -- is relevant to whether a case is a "civil action." Indeed, here again, Congress has taken the opposite view in another statute. In the Individuals with Disabilities Education Act (hereinafter "IDEA"), Congress authorized on-the-record administrative review of *state* agency action, in federal court, as a "civil action" within federal jurisdiction. 20 U.S.C. § 1415(e).

Under the IDEA, the federal government funds state efforts to give individualized educational opportunities to students with disabilities in public schools. The Act provides that parents and school officials should work together to determine how best to further the student's educational development through an "individualized educational program" (hereinafter "IEP"). If parents are dissatisfied with the program developed by those officials, they may petition the school for a due process hearing and may appeal that decision to the state educational agency.



*Id.* § 1415(c). Thereafter, "[a]ny party aggrieved by the findings and decision" made by the state agency "shall have the right to bring a *civil action* . . . in any State court of competent jurisdiction *or in a district court of the United States* without regard to the amount in controversy." *Id.* § 1415(e)(2) (emphasis added).

With respect to the standard of review, the IDEA provides: "In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." *Id.* In *Board of Education v. Rowley*, 458 U.S. 176 (1982), this Court interpreted the statute as requiring reviewing courts to give substantial deference to the state agency's prior action:

> [T]he provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to the compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought. The fact that § 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings.

*Id.* at 206. The Court held that a state decision must be upheld if it is "reasonably calculated to enable the child to receive educational benefits." *Id.* at 206-07.

Since Congress, in the IDEA itself, labeled such administrative review actions involving a deferential standard as "civil actions," it is not surprising that several courts have held that section 1441 authorizes removal of an IDEA administrative review action from state to federal court. *See Fayetteville Perry Local Sch. Dist. v. Reckers*, 892 F. Supp. 193, 199 (S.D. Ohio 1995); *Colin K. v. Schmidt*, 528 F. Supp. 355, 359 (D.R.I. 1981); *cf. Amelia County Sch. Bd. v. Virginia Bd. of Educ.*, 661 F. Supp. 889, 895 (E.D. Va. 1987) (case remanded because challenge to IEP arose under state, not federal law). There is no reason to adopt a different interpretation of section 1441 here, where the federal claims asserted against a local agency are based on the U.S. Constitution.

To the extent that the decision below was based on some perception, albeit unexplained, that it would be inappropriate to allow defendants to bring on-the-record state administrative review claims into federal court even when they are intertwined with federal claims,[15] that is a determination that should be left to Congress. It is, of course, the province of Congress to control the boundaries of federal court jurisdiction. U.S. Const. art. III, § 1; *see Palmore v. United States*, 411 U.S. 389, 401 (1973). And Congress certainly has acted to limit removal jurisdiction for specific types of claims when it has seen a need to do so. *See* 28 U.S.C. § 1445 (nonremovable actions include: FELA actions; civil actions against carriers for damages involving shipments; workmen's compensation cases; and civil actions arising under the Violence Against Women Act of 1994.); *id.* § 1341 (barring removal of civil actions to enjoin state tax determinations); *id.* § 1342 (barring removal of civil actions to enjoin state rates and tariffs). This is thus an appropriate case for application of the principle that, when

[15]Such a perception would be difficult to defend in light of the fact that federal courts are authorized to give deferential review of federal agency actions and *de novo* review of state agency actions. *See* pp. 14-17 *supra*.



Congress has spoken, its intent is "conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

There are, to be sure, non-statutory limitations on federal jurisdiction that this Court has recognized. But the list of recognized exceptions numbers only two: probate cases, *see Byers v. McAuley*, 149 U.S. 608, 615 (1893); *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33 (1909); *Markham v. Allen*, 326 U.S. 490 (1946), and domestic relations cases. *See Barber v. Barber*, 21 How. 582, 584 (1858); *Ex Parte Burrus*, 136 U.S. 586, 593-94 (1890); *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930).[16] These historical exceptions were based on the belief that the English courts of chancery -- the English analog to American courts' equity jurisdiction -- did not have jurisdiction over probate, which was "the distinctive function[] of the ecclesiastical courts in England." Paul M. Bator, *et al.*, *Hart & Wechsler's The Federal Courts and The Federal System* 1456 (3d ed. 1988). The exceptions arose during a time when the language of the diversity statute limited federal jurisdiction to "suits of a civil nature in law or in equity." *See* Judiciary Act of 1789, 1 Stat. 73 (codified at 28 U.S.C. § 41(1), recodified at 28 U.S.C. § 1345).

Moreover, it is essential to recognize that the domestic relations and probate exceptions apply only to the federal courts' *diversity* jurisdiction. *See De La Rama v. De La Rama*, 201 U.S. 303, 307 (1906) (basing the domestic relations exception on the lack of diversity, because husband and wife by law cannot be diverse from one another). No exceptions can

[16]And even those categories have been circumscribed and their place in federal jurisdiction jurisprudence questioned by this Court in recent years. *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), makes crystal clear that the domestic relations exception to federal court jurisdiction is not found in either Article III of the Constitution or in an Act of Congress. *Id.* at 697.

exist with respect to federal question jurisdiction because Congress, and not the common law, defines the scope of federal question jurisdiction. *See Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976).

In sum, there is no basis for the argument that the federal courts lack the authority to take cognizance of an entire case like this one, involving federal constitutional claims intertwined with state administrative claims requiring deferential review.

### B. At a Minimum, the District Court Had the Authority to Retain Jurisdiction Over the Federal Claims.

Even if there were some reason to foreclose federal courts from hearing "deferential" state administrative review claims, it still would make no sense to incorporate such a limitation into the definition of a civil action subject to removal under section 1441. The effect of such an interpretation, as this case illustrates, would be to prevent even the federal claims filed in a state court action from being brought into federal court. Congress cannot have so intended.

In deciding to remand the entire case -- including the federal claims -- back to the state courts, the court of appeals resorted to a questionable application of *dicta* from its own Eleventh Amendment jurisprudence. The court drew an analogy to *Frances J. v. Wright*, 19 F.3d 337 (7th Cir.), *cert. denied*, 513 U.S. 876 (1994), a case where the plaintiffs had brought suit in state court asserting federal claims for damages and injunctive relief against state officials in their official capacity. When the case was removed to federal court, the Seventh Circuit held that removal was not authorized by section 1441 because part of the case -- the claim for damages -- was barred from being heard in federal court under the Eleventh Amendment. It reasoned that "if even one claim in an action is jurisdictionally barred from the federal court by a state's sovereign immunity, *or does not fit*



*within the original or supplemental (see 28 U.S.C. § 1367) jurisdiction of the federal courts*, then as a consequence of § 1441(a), the whole action cannot be removed to federal court." Pet. App. 21a (quoting *Frances J.*, 19 F.3d at 341) (emphasis added).

Here, the Seventh Circuit extended the logic of *Frances J.* to actions seeking review of local administrative law decisions. Having held that the state-law claims could not be heard in federal court, it concluded that the entire case was not a "civil action" within the original jurisdiction of the federal courts and that even the federal claims were not removable. Whatever the merits of the *Frances J.* decision, the court of appeals was clearly wrong to extend the logic of that ruling to cases where, as here, the Eleventh Amendment is not implicated.[17]

If it reaches this issue, the Court should hold that *Frances J.* is wrong -- *i.e.*, that the removal statute authorizes removal of federal claims even when they are combined in a state court complaint with state-law claims that cannot be heard in federal court. This Court has recognized that, when a single federal complaint combines claims that are barred by the Eleventh Amendment with claims that are not, the federal court has jurisdiction and should only dismiss the barred claims. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 120-21 (1984). As the Court put it in *Pennhurst*, "[a] federal

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[17]The court of appeals conceded, as it had to, that the Eleventh Amendment was not implicated in this case. It has long been settled by this Court that municipalities and counties are not protected by sovereign immunity and thus cases can be brought against them without violating the Eleventh Amendment. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Lincoln County v. Luning*, 133 U.S. 529 (1890).

court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Id.* at 121.[18]

There is no reason to interpret section 1441 any differently. *See Kruse v. State of Hawaii*, 68 F.3d 331, 335 (9th Cir. 1995) (proper course is to remand barred claims to state court and retain non-barred claims); *Henry v. Metropolitan Sewer District*, 922 F.2d 332, 338 (6th Cir. 1990) (same); *see generally* Mitchell N. Berman, Note, *Removal and the Eleventh Amendment: The Case for District Court Remand Discretion to Avoid a Bifurcated Suit*, 92 Mich. L. Rev. 683, 707 (1993) (criticizing rationale of remanding all claims to state court).

It follows that, even accepting the Seventh Circuit's unsupported notion that the state claims in this case were not cognizable in federal court, the district court was right to retain the federal claims.[19] The court of appeals provided no real justification for ignoring one of the fundamental obligations of federal courts -- their "strict duty to exercise the jurisdiction

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[18]This is in accord with this Court's routine practice of allowing federal courts to hear federal question claims not barred by the Eleventh Amendment after barred claims are dismissed. *See Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Edelman v. Jordan*, 415 U.S. 651 (1974).

[19]*See Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958 (S.D.N.Y. 1989), *aff'd*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). In *St. Bartholomew's*, state law administrative claims challenging a landmarks decision were filed in federal court along with federal constitutional claims under the takings and free exercise clauses. In *St. Bartholomew's*, the court appropriately decided that even if the state administrative law claims were barred from federal court (a conclusion the court did not reach) there was no reason not to exercise jurisdiction over the federal constitutional claims. 728 F. Supp. at 964 & n.12, 965 n.15.



that is conferred upon them by Congress." *Quackenbush v. Allstate Insurance Co.*, 116 S. Ct. 1712, 1720 (1996) (citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 821 (1976); *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411, 415 (1964); *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257 (1821)). There is no reason to think Congress intended to exclude the federal claims at issue here from resolution in a federal tribunal. That choice should be respected.

## CONCLUSION

For the foregoing reasons, the Seventh Circuit's decision should be reversed.

Respectfully submitted,

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